

February 10, 2016

BY ELECTRONIC FILING AND HAND DELIVERY

Hon. Naomi Reice Buchwald
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: Rubenstein v. Leone et al., No. 15 Civ. 9794

Dear Judge Buchwald:

I write on behalf of Nominal Defendant RCS Capital Corporation (“RCS Capital”) in response to the letter filed in the above-referenced action by Plaintiff’s counsel on February 5, 2016, which contends the bankruptcy petition filed by RCS Capital does not stay this action because Plaintiff’s claim for recovery of short-swing profits under Section 16(b) of the Securities and Exchange Act is the property of the Plaintiff rather than the bankruptcy estate. As authority for this proposition, Plaintiff cites a single case from this District, *Schaffer v. CC Investments, LLC*, 286 F. Supp. 2d 279 (S.D.N.Y. 2003). That case’s holding is premised on reasoning that has since been foreclosed by Second Circuit precedent.

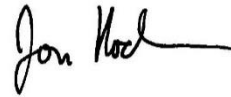
It is well established that a shareholder may not bring a derivative action on behalf of a corporation after the filing of a bankruptcy petition by the corporation, since upon the filing of a petition, such actions become the property of the bankruptcy estate pursuant to 11 U.S.C. § 541. *See Mitchell Excavators, Inc. v. Mitchell*, 734 F.2d 129, 131 (2d Cir. 1984), *quoting Pepper v. Litton*, 308 U.S. 295, 306-07 (1939) (fiduciary obligation of corporate officers “‘is, in the event of bankruptcy of the corporation, enforceable by the trustee’” rather than “‘through a stockholder’s derivative action’”); *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir. 1986) (bankruptcy “prevent[s] individual shareholders and creditors from suing to enforce a right of [a] corporation”). Because shareholder derivative actions are property of the bankruptcy estate pursuant to 11 U.S.C. § 541, the prosecution of such actions is automatically stayed upon the filing of a bankruptcy petition pursuant to 11 U.S.C. § 362(a)(3), which provides for a stay of “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.”

In *Schaffer*, Judge Marrero held that actions under Section 16(b) of the Securities and Exchange Act were distinguishable from “traditional shareholder derivative action[s],” in that they primarily belonged to the shareholder rather than the corporation, and that they were therefore not subject to a stay pursuant to 11 U.S.C. § 362. 286 F. Supp. 2d at 282-83. Judge Marrero made his ruling in *Schaffer* without the benefit of Second Circuit precedent, noting that there was “little guidance” on the issue before him. *Id.* at 279. However, after Judge Marrero’s

decision, the Second Circuit explicitly held that an action to recover short-swing profits pursuant to Section 16(b) was the “exclusive property of the bankruptcy estate.” See *iXL Enters., Inc. v GE Capital Corp.*, 167 F. App’x 824, 826 (2d Cir. 2006) (affirming an order substituting a bankrupt corporation for a shareholder as plaintiff in a Section 16(b) action).¹

In light of the Second Circuit’s decision in *iXL Enterprises*, it is clear that the instant Section 16(b) action was stayed pursuant to 11 U.S.C. § 362 when RCS Capital filed its bankruptcy petition. This stay is “automatic and mandatory” upon the filing of the bankruptcy petition. See *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 790 F.2d 206, 207 (2d Cir. 1986). RCS Capital will act accordingly unless and until the Court indicates a different view or the automatic stay is lifted.

Respectfully submitted,



Jonathan L. Hochman

cc: Counsel of Record (by ECF)

¹ This Court has previously relied on *iXL Enterprises* for the proposition that “[a]ny derivative claims held by individual shareholders . . . accrue[] to [a bankrupt corporation], in its role as debtor-in-possession, upon the filing of [a] bankruptcy petition.” *In re Ambac Fin. Grp., Inc.*, Nos. 10-B-15973 (SCC), 11 Civ. 7529 (NRB), 2011 WL 6844533, at *2 (S.D.N.Y. Dec. 29, 2011) (emphasis added) (citing *iXL Enters.*, 167 F. App’x at 826), *aff’d*, 487 F. App’x 663 (2d Cir. 2012). As the Court noted in *Ambac*, the fact that the instant action was filed prior to RCS Capital’s bankruptcy petition is “irrelevant to the operation of this regime.” *Id.* (citing *iXL Enters.*, 167 F. App’x at 827 n.2).